IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	**)**	
	)	
Respondent,	**)**	
	)	
vs.	**)**	**No. SC 87840**
	)	
JOHN BURGIN,	**)**	
	)	
Appellant.	**)**	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI
TWENTY-FIRST JUDICIAL CIRCUIT, DIVISION 20
THE HONORABLE COLLEEN DOLAN, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

John Burgin appeals his conviction following a jury trial in the Circuit Court of St. Louis County, Missouri, for two counts of sexual misconduct involving a child, § 566.083.[1] The Honorable Colleen Dolan sentenced Mr. Burgin to concurrent terms of imprisonment of four years on each count. Following the issuance of an opinion in ED 86200 reversing Mr. Burgin's convictions, the Missouri Court of Appeals, Eastern District, sustained the State's motion to transfer this appeal to this Court pursuant to Rule 83.02. This Court has jurisdiction of this appeal under Article V, Section 10, Mo. Const. (as amended 1982).

[1] All statutory citations are to RSMo 2000, unless otherwise stated.

STATEMENT OF FACTS

Six-year-old Devin Heavel alleged that his mother's friend, John, exposed himself to Devin and his three-year-old brother, Cody (Tr. 205-06, 208).[2]

Devin and Cody lived with their father, Charles, in Hazelwood; Charles's sister Andrea was their babysitter during the day, in Charles's home (Tr. 205-06). The boys' mother, Rachel Slusser, lived in a two bedroom apartment in Florissant (Tr. 227, 238, 252). She had dated John Burgin for four or five months as of November, 2003, and he spent the night in her apartment on November 5, a night Rachel had overnight visitation with her two sons (Tr. 239-41). Rachel dropped the boys off with Andrea at Charles's home on her way to work on November 6 (Tr. 206-07, 241-42).

Soon after Rachel dropped off the boys, Devin went to Andrea and told her that his friend John had a big "wee-wee" that grows (Tr. 207-08). When Andrea asked him how he knew it was big, Devin said that John "took it out and showed it" to Devin and Cody (Tr. 208). She asked how he knew it grew and Devin said, "Because it got big when he pulled up on it." (Tr. 208). Andrea told Devin to go play, then called her brother, Charles, the boys' father, and told him what Devin had told her (Tr. 208-09). Over Mr. Burgin's objection, Andrea testified that she would be surprised to hear that Devin hit someone if he were told "no" or did not get his way (Tr. 211).

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[2] The Record on Appeal consists of a trial transcript (Tr.), a § 491.075 hearing transcript (Hr.Tr.), and a legal file (L.F.).

When Andrea called Charles at work, he came home, calling Rachel along the way (Tr. 221, 228). Charles talked to Devin and Devin told him that "John had showed him his penis and . . . it grew when he played with it." (Tr. 221-22). Charles "wanted to make sure that [Devin] was definitely telling the truth before we proceeded." (Tr. 222). This happened in the living room (Tr. 227).

Charles was also asked, "Now, if you were told that Devin didn't get his way, he wanted to play with a toy or something, and he didn't get his way, so he got mad and punched somebody, would you be surprised by that?" (Tr. 223-24). Charles answered, "Very" and Mr. Burgin's objection that this was again a hypothetical was then overruled (Tr. 224). Charles again said he "would be very surprised." (Tr. 224).

Rachel testified that she left Devin and Cody with Mr. Burgin while she ran some errands (Tr. 241). She had left the boys with him one or two times before (Tr. 244-45). The boys and Mr. Burgin were asleep when she got home, and she did not talk to any of them until the morning (Tr. 241). No one mentioned anything happening the night before, either during breakfast or when Rachel took the boys back home to their father's (Tr. 241-42). Mr. Burgin left before Rachel took the boys (Tr. 248). Their conversation and interaction was nothing out of the ordinary (Tr. 248).

Rachel had just arrived at work when Charles called her and repeated for her what Andrea said Devin had told her (Tr. 242, 249). She went to Charles's house and spoke with Devin; he told her what he had told Andrea and Charles, "that Mr. Burgin had pulled down his pants and played with himself in front of the children." (Tr. 243).

Charles was very upset (Tr. 243). Devin first told his mother that this happened on the couch in the living room; he later said it was in the bedroom (Tr. 251).

Rachel also went to the police station when Charles took Devin to talk to a detective (Tr. 252). After Rachel spoke to the officer, she wrote a statement as requested, in which she repeated what Mr. Burgin had told her, that he was in the bathroom and the door did not close all the way (Tr. 252-53). Rachel did not tell the detective that Mr. Burgin's statement about the door was incorrect, though she testified that the door actually did close all the way and could be locked (Tr. 257, 264-66).

Florissant police detective Michael Rimiller interviewed Devin when Charles and Rachel brought him in (Tr. 268-69). Rimiller asked Devin if he knew why he was at the police station and Devin told him that "it was because of John." (Tr. 270-71). Rimiller asked who John was and Devin said he was a friend of his mother, and was at her apartment the night before (Tr. 271).

Devin said that he and Cody were alone with John while their mother went to get pizza (Tr. 271). While Devin was wrestling with John, "John pulled out his pee-pee and started rubbing on it." (Tr. 271). Devin "made a comment that it got bigger when he rubbed it[,]" and Rimiller asked if John had asked him to touch it (Tr. 271). Devin said yes, but that "it was gross and . . . he ran into the bedroom." (Tr. 271-72). Rimiller assumed that the incident happened in the living room because Devin mentioned a couch (Tr. 273). Devin said Cody was in the room at the time (Tr. 272).

Detective Rimiller determined that there was probable cause to proceed to a forensic interview of Devin at the Children's Advocacy Center (Tr. 274-75, 277).

Beverly Tucker conducted that interview; she has been an interviewer at CAC since 1999 (Tr. 280-81). A tape of the interview was played for the jury, in which Ms. Tucker described CAC to Devin as a place where kids can go to talk, and Devin said "or they can talk about cops and their pee pee and showing it to them." (Tr. 288, 291-92; State's Exhibit 2; 10:12).[3] After first saying he did not remember anything happening, Devin said that his friend John, which stayed with Devin's mother sometimes, "showed his pee pee at" Devin (Ex. 2; 10:12). When Ms. Tucker asked Devin to say again what John had showed him, Devin said, "his penis." (Ex. 2; 10:17).

Devin said this happened at his mother's home, in the living room (Ex. 2; 10:18). They were wrestling, which he liked doing with John (Ex. 2; 10:18). After Devin said that John showed Devin and Cody his penis, Ms. Tucker asked if John said anything and Devin said no (Ex. 2; 10:19). Ms. Tucker asked again what happened and Devin said, "he asked me if I could touch it but I said no." (Ex. 2; 10:20). Ms. Tucker asked if John tried to make Devin touch it and Devin said yes (Ex. 2; 10:20). She asked what he did and Devin said "all he did was show his penis at me." (Ex. 2; 10:20).

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[3] There is no time counter on the tape; there is an analog wall clock visible, from which it is very difficult to note precise times of specific statements on the tape. Undersigned counsel has tried to provide approximate times as shown on the clock.

Later in the interview, Ms. Tucker asked Devin what John's penis looked like and Devin answered, "long." (Ex. 2; 10:24). When Devin asked Ms. Tucker if he could leave, she asked him if John had done anything with his penis (Ex. 2; 10:25). Devin started to say no, then said yes, and when asked what he did, Devin said John put it down, then pushed it up, "just to make it grow." (Ex. 2; 10:25). Ms. Tucker asked if it did, and Devin shook his head "no," and said, "uh-uh." (Ex. 2; 10:25). Ms. Tucker asked Devin why John stopped and Devin said because Devin told him to (Ex. 2; 10:25).

Devin testified at trial and said that he knew Mr. Burgin; he was a friend of Devin's mother's and they met one night at her home (Tr. 179-80). He was asked if anything weird happened when they met and Devin said he did not remember (Tr. 180). He was asked what Mr. Burgin did when Devin's mother left and he again said he did not remember (Tr. 180). He agreed when asked if they had wrestled, but when he was asked what happened after that, said he did not remember (Tr. 180).

The prosecutor then reminded Devin that he had discussed with her that it was important to tell the truth, to which he answered "yes," and she then told him that if he remembered what happened, he had to tell (Tr. 180-81). She asked again what happened after wrestling and Devin said "I don't remember." (Tr. 181). He first did not, then did, remember talking to the detective, but did not remember what he told him (Tr. 181).

Finally, the prosecutor asked whether John had tried to show him something and Devin said yes (Tr. 183-84). When asked what it was, Devin said, "His private."

(Tr. 184). Devin said he saw John's private, and he saw it grow, because John "was like pushing it up or something." (Tr. 184). Devin said Cody was in the room, and John did not say anything (Tr. 184). Devin remembered being in his mother's bedroom when this happened (Tr. 194-95). He denied telling his aunt and his father that it happened in the living room, but did not remember what he told his mother, the detective, or Ms. Tucker (Tr. 195-96). He did not remember telling anyone that it was in the living room (Tr. 198).

Mr. Burgin testified in his defense and denied knowingly exposing himself to Devin or Cody (Tr. 315). He agreed that he was at Rachel's home on November 5, 2003, and that he was alone with Devin and Cody while Rachel was out doing some errands (Tr. 317-18). The boys were watching a movie on the television in their room and Mr. Burgin was watching TV in the living room (Tr. 319). At some point, Devin asked if he could play the Nintendo that was located in the living room, and Mr. Burgin said he could when his own program was over (Tr. 320). Devin ran up to Mr. Burgin and hit him "in the groin area." (Tr. 320-21). He then ran to his bedroom (Tr. 321).

Feeling sick to his stomach, Mr. Burgin went into the bathroom, stopping at the boys' door to tell Devin to stay in his room (Tr. 321). Mr. Burgin was upset (Tr. 321). He pulled down his pants and was checking himself for injuries, when the door was pushed or kicked open (Tr. 321). It was Devin, who was yelling and screaming; Mr. Burgin told him to go back to his room (Tr. 321-22). Mr. Burgin explained that the door had hooks placed over the top as hangers, which prevented the door from

closing completely (Tr. 322). If Devin saw Mr. Burgin's genitals, it was when he was in the bathroom (Tr. 334-35).

Mr. Burgin went to bed before Rachel got home (Tr. 323-24). The next morning, Devin and Rachel were up before Mr. Burgin left for work (Tr. 324). He soon got a message to call Rachel, which he did, and was shocked to learn that Devin had accused him of exposing himself (Tr. 325). He tried to assure Rachel that the allegation was not true (Tr. 326). They spoke for five to ten minutes, then Rachel called back a few minutes later, saying Charles wanted to talk to him (Tr. 326). No such conversation happened; Mr. Burgin could hear arguing in the background, then Rachel said they were going to the police and she would let him know what was going on (Tr. 326-27).

Later, Mr. Burgin received a call from detective Rimiller, who asked him to come to the police station and make a statement (Tr. 327). Mr. Burgin agreed, saying he would be in after work (Tr. 328). Mr. Burgin went after work and spoke with a different detective, since Rimiller left at 5:00 (Tr. 328). He answered questions and wrote a statement, for about an hour to an hour and fifteen minutes, then was released (Tr. 329-30).

Mr. Burgin heard nothing more from the police before, having had no success in finding permanent work, he left Missouri on December 3 to return to Florida, where his children and other family members lived (Tr. 330-32). Mr. Burgin was eventually extradited to Missouri (Tr. 334).

The State recalled Rachel in rebuttal, who said that Mr. Burgin told her that he was wrestling with Devin when Devin kicked him in the groin (Tr. 345). She did not recall him saying Devin kicked him after being told he could not play Nintendo (Tr. 345-46). Someone -- either Charles or Devin -- told Rachel that Devin and Mr. Burgin were wrestling before Rachel heard it from Mr. Burgin (Tr. 347-48).

After deliberating for an hour and a half on the first day, and approximately two and a half hours the next day,[4] the jury found Mr. Burgin guilty of both counts (L.F. 39-40; Tr. 378) On April 18,[5] 2005, the court[6] sentenced Mr. Burgin to concurrent terms of four years on each count (L.F. 47-48; App. A-1 - A-3). Notice of appeal was filed April 22, 2005 (L.F. 51).

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[4] The transcript indicates that the court directed the jury to appear at 9:00 a.m. the second day (Tr. 378), but does not indicate whether that in fact happened (Tr. 380) (it did request Exhibit 2 and a VCR at 9:30 a.m.; Tr. 380). The jury reached a verdict at 11:40 a.m. (Tr. 383).

[5] The sentence and judgment contains three different dates: on the first page, it states sentencing dates of both April 15 and April 24, but it also has a file-stamp by the circuit clerk on April 18 (L.F. 47; App. A-1), and the third page shows that it was executed on April 18 (L.F. 49; App. A-3). The transcript indicates a sentencing date of April 18 (Tr. 388).

[6] Mr. Burgin waived jury sentencing before trial commenced (L.F. 18).

POINTS RELIED ON

I.

The trial court plainly erred in entering a judgment of conviction and sentencing Mr. Burgin on the verdict of guilty of two counts of sexual misconduct involving a child, under § 566.083, because the rulings violated Mr. Burgin's right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that this Court struck down § 566.083 as unconstitutional, thus it would be a manifest injustice and miscarriage of justice to convict and sentence Mr. Burgin to prison for violating an unconstitutional statute.

State v. Beine, 162 S.W.3d 483 (Mo. banc 2005);

State ex rel. Williams v. Marsh, 626 S.W.2d 223 (Mo. banc 1982);

State v. Parkhurst, 845 S.W.2d 31 (Mo. banc 1993);

State v. Mitchell, 563 S.W.2d 18 (Mo. banc 1978);

U.S. Const., Amend. XIV;

Mo. Const., Art. I, Sec. 10; and Art. V, Section 2;

§ 566.083, RSMo 2000;

§ 566.083, RSMo Cum. Supp. 2005; and

Rule 30.20.

II.

The trial court abused its discretion in overruling Mr. Burgin's objections to the testimony from Andrea Douglas and Charles Heavel that they would be "surprised" to hear that Devin would react by hitting if told that he could not do something, because this denied Mr. Burgin his rights to due process of law and to a fair trial, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the evidence was in the nature of hypotheticals and was thus merely the witnesses' speculative opinions as to Devin's possible future behavior, which lay opinions were not admissible to show that Devin behaved in accordance with those opinions on a particular occasion. The evidence prejudiced Mr. Burgin because it improperly refuted his defense that, if Devin saw his genitals, it was unintentional and occurred only because Mr. Burgin went into the bathroom to check himself for injury after Devin hit Mr. Burgin in the groin when he was told that he would have to wait to play Nintendo.

State v. Williams, 673 S.W.2d 32 (Mo. banc 1985);

State v. Dudley, 912 S.W.2d 525 (Mo.App. W.D. 1995);

State v. Mitchell, 847 S.W.2d 185 (Mo.App. E.D. 1993);

State v. Sanders, 842 S.W.2d 916 (Mo.App. E.D. 1992);

U.S. Const., Amends VI and XIV; and

Mo. Const., Art. I, Secs. 10 and 18(a).

ARGUMENT

I.

The trial court plainly erred in entering a judgment of conviction and sentencing Mr. Burgin on the verdict of guilty of two counts of sexual misconduct involving a child, under § 566.083, because the rulings violated Mr. Burgin's right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that this Court struck down § 566.083 as unconstitutional, thus it would be a manifest injustice and miscarriage of justice to convict and sentence Mr. Burgin to prison for violating an unconstitutional statute.

The statute Mr. Burgin was convicted of violating, sexual misconduct involving a child, § 566.083.1(1), RSMo 2000, was declared unconstitutional by this Court eight days after Mr. Burgin was sentenced to two concurrent terms of four years each for violating it (L.F. 47-48); ***State v. Beine***, 162 S.W.3d 483 (Mo. banc 2005).

In ***Beine***, the Court first found that the evidence was insufficient to sustain the conviction, then said, "this conviction also cannot stand because the portion of the statute upon which Mr. Beine was charged and convicted is patently unconstitutional." *Id*., at 486. The Court specifically considered subdivision (1) of § 566.083.1, RSMo 2000 (App. A-4), which at the time stated that a person commits the crime of sexual misconduct involving a child if the person "(1) Knowingly exposes the person's genitals to a child less than fourteen years of age in a manner

that would cause a reasonable adult to believe that the conduct is likely to cause affront or alarm to a child less than fourteen years of age." *Id*., at 484-85. The statute had not been amended as of November 5, 2003, the date Mr. Burgin allegedly violated it (*see* Chapter 566, RSMo Cum. Supp. 2003; App. A-5 - A-6), thus, the language under which Mr. Burgin was charged and the jury was instructed was the same as in the statute at issue in ***Beine*** (L.F. 6-7, 29, 31).[7]

As this Court noted in ***Beine***, because the statute is "patently unconstitutional," Mr. Burgin's convictions cannot stand. *Id*., at 486. But because ***Beine*** came down after the notice of appeal was filed herein, Mr. Burgin did not raise this issue at trial, thus review is for plain error, which is warranted where "the alleged error so substantially affects the rights of the accused that a manifest injustice or a miscarriage of justice inexorably results, if left uncorrected." ***State v. Hadley***, 815 S.W.2d 422, 423 (Mo. banc 1991); Rule 30.20.

That a conviction under a unconstitutional statute is manifestly unjust is as self-proving a proposition as is conceivable. Can it seriously be argued that even

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[7] In response to ***Beine***, the legislature amended the statute to remove the language this Court found problematic, see H.B. 353. § 566.083.1(1), RSMo Cum. Supp. 2005 (App. A-7), now reads: "A person commits the crime of sexual misconduct involving a child if the person . . . (1) Knowingly exposes his or her genitals to a child less than fourteen years of age under circumstances in which he or she knows that his or her conduct is likely to cause affront or alarm to the child[.]"

though the law under which he was convicted is invalid, Mr. Burgin must nevertheless serve (what remains of)[8] his sentence? The answer must be no. Mr. Burgin's convictions and sentence are manifestly unjust and he is entitled to relief under Rule 30.20.

Further:

> [I]f it be true, as must be true, that an unconstitutional law is no law, then its constitutionality is open to attack at any stage of the proceedings and even after conviction and judgment, and this upon the ground that no crime is shown, and therefore the trial court had no jurisdiction because its criminal jurisdiction extends only to such matters as the law declares to be criminal; and if there is no law making such declaration, or, what is tantamount thereto, if that law is unconstitutional, then the court which tries a party for such an assumed offense, transcends its jurisdiction. . . ."

State ex rel. Williams v. Marsh, 626 S.W.2d 223, 227 (Mo. banc 1982), *quoting* ***Ex parte Smith***, 135 Mo. 223, 36 S.W. 628, 630 (1896); *also see* ***State v. Parkhurst***, 845 S.W.2d 31, 35 (Mo. banc 1993) ("a defendant may for the first time on appeal raise either the issue of the trial court's jurisdiction to try the class of case of which defendant was convicted or a separate claim that the indictment or information was insufficient to charge the crime of which defendant was convicted."); ***State v.***

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[8] Mr. Burgin has been incarcerated since March 31, 2004 (L.F. 1-5), and has thus now served more than two years of his four year sentence.

Mitchell, 563 S.W.2d 18, 23 (Mo. banc 1978) ("it is well settled in this state that jurisdictional defects and defenses are not waived by entering a guilty plea. [citations omitted]. It is apparent therefore that appellant did not waive his objections to the facial constitutionality of the statute under which he was convicted since, if it were found facially unconstitutional, the appellant could not have been legally convicted and incarcerated for its violation."). It follows that conviction of an unconstitutional law is a denial of due process under the Fourteenth Amendment and Art. I, § 10.

The State's main argument in the Court of Appeals was that this Court's decision in ***Beine*** declaring 566.083(1), RSMo 2000, unconstitutional was *dicta*. (Resp.Br. 8-11). The State asked the Court of Appeals to rule that this Court did not mean what it explicitly said in ***Beine***. (Resp.Br. 8). It argued that the language: "this conviction also cannot stand because the portion of the statute upon which Mr. Beine was charged and convicted is patently unconstitutional[,]" (162 S.W.3d at 486), meant something else entirely. It said "the primary holding of the majority of the Court" was that the evidence was insufficient to convict Mr. Beine. (Resp.Br. 8). But this Court made its choice to address the validity of the statute, and held it to be unconstitutional, and that should end the matter.

Nonetheless, the State argued in the Court of Appeals, and will presumably argue in this Court, essentially that the Court should ignore its express holding in ***Beine***. For that proposition the State cited three other cases from this Court and one from the Western District of the Court of Appeals. (Resp.Br. 9-10). The State first said that ***Brooks v. State***, 128 S.W.3d 844, 852 (Mo. banc 2004), stands for the

proposition that "[S]tatements . . . are *obiter dicta* [if] they [are] not essential to the court's decision of the issue before it." (Resp.Br. 9). That may be a correct statement of the law, but the State's argument ignored the fact that this quotation is taken from the dissenting opinion of Judge White. 128 S.W.3d at 852.

And while quoting a basic proposition from a dissenting opinion is not in itself improper, that fact is important here, because the point on which then Chief Justice White dissented from his colleagues was whether there was anything in the Missouri Constitution that required a showing that increased costs resulting from the newly required activity -- background checks for concealed weapons permits -- must be greater than *de minimis*. *Id*. Judge White wrote that the "*de minimis*" language in ***City of Jefferson v. Mo. Dept. of Natural Resources***, 916 S.W.2d 794 (Mo. banc 1996), relied upon by the majority, was "merely *dicta*." *Id*. The majority did not agree and therefore relied on that language in reaching its decision. 128 S.W.3d at 849. The point is that it is for this Court, not the State, to decide what was "essential" to its decision in ***Beine***.

In ***State ex rel. Anderson v. Hostetter***, 346 Mo. 249, 140 S.W.2d 21, 24 (Mo. banc 1940), in discussing an unrelated case that was appealed twice, and in which the opinion in the second appeal criticized a statement from the first opinion, the ***Anderson*** Court said that the criticism was *obiter dictum*, and the Court of Appeals was not bound to follow it. That discussion has no application here, because the Court in ***Beine*** did not undertake to gratuitously criticize an earlier opinion or give advice on a proposition of law that was not before it. Instead, in ***Beine***, the defendant

challenged the constitutionality of the statute under which he was convicted, and the Court ruled the statute unconstitutional. 162 S.W.3d at 486. That was the question the Court was asked to address and cannot be called "not essential" to its decision.

Finally, in ***State v. McFall***, 991 S.W.2d 671, 674-75 (Mo.App. W.D. 1999), the Court of Appeals speculated that, *if the facts were otherwise*, the trial court's order suppressing evidence might not have been justified. Judge Ellis pointed out in his concurring opinion that it was not proper to speculate about the effects of a change in the facts. *Id*., at 675. Again, the Court made no statement about the effect of *dicta* and it did not rely on *dicta*. It certainly did not independently, as this did Court in ***Beine***, rule on the merits of the case.

The State also claimed below that ***Beine*** was merely an "advisory opinion." (Resp.Br. 10). But that argument ignores the most telling fact of all: there was a lengthy dissent from the holding in ***Beine*** that § 566.083.1(1) RSMo 2000 was unconstitutional, 162 S.W.3d at 489-97, but the dissent did *not* challenge whether the Court should even have reached that issue. If doing so was not proper on jurisprudential principles, surely the dissent would have pointed that out.

More importantly, there is no rule of law stating that the Court *cannot* reach the constitutional issue. Rather, it is a matter for the Court's discretion; it "will not address a constitutional question if the case can be fully determined without reaching it." ***State v. Eisenhouer***, 40 S.W.3d 916, 919 (Mo. banc 2001). The use of the term "will" says only that the Court has the choice. Otherwise, the Court would have said that it *may* not address the question. *See, e.g.*, ***Hall v. Martindale***, 166 S.W.2d 594,

608 (Mo.App. St.L.D. 1942) (the term "will" in instruction on punitive damages was not used imperatively). Once this Court has made its choice, it should not be revoked simply because the State wishes to salvage one prosecution.[9]

For similar reasons, the State's citation to ***State v. Self***, 155 S.W.3d 756 (Mo. banc 2005) (Resp.Br. 10), is unavailing. In ***Self***, this Court said that "a constitutional controversy cannot be manufactured in the trial court or on appeal in order to obtain an advisory opinion." *Id*., at 761. The Court felt that the constitutionality of the compulsory school attendance law would depend on how different school districts defined the term "regularly," as used in the statute. *Id*. Only if people subject to the law were exposed to differing interpretations in different school districts would there be a true constitutional issue, so the Court declined to reach the question: "In the absence of record support for the allegations of the parties that different districts

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[9] Although counsel for the State referred in oral argument in the Court of Appeals to an unpublished opinion in that Court declining to apply ***Beine*** to invalidate a different defendant's conviction under § 566.083.1(1), RSMo 2000, and in which case this Court denied transfer, Mr. Burgin does not have the name of the case, or, of course, a copy of the opinion available to him. Despite this unfortunate result for the defendant in that case, there cannot be a significant number of prosecutions still pending under § 566.083.1(1) RSMo 2000, especially since the amendment of the statute in 2005, as noted above.

interpret the statute in different and inconsistent ways, it is inappropriate and premature for this Court to address the constitutional issue raised." *Id*.

Once more, the same was not true in the case of ***Beine***. There, the Court said that the statute was "patently unconstitutional." 162 S.W.3d at 486. It was not necessary to defer a ruling on the constitutionality of the statute because the Court had all the facts it needed to reach a decision. Further, ***Beine*** was decided after ***Self*** -- in April, 2005, as opposed to February for ***Self***. The Court thus chose to follow a different path as to the propriety of reaching the constitutional question than it had in ***Self***, and, therefore, was well aware of its statements and reasoning two months earlier. While the State may criticize ***Beine*** for this Court's failure to "exercise restraint" (Resp.Br. 10), that alone does not constitute adequate cause to retreat from its holding barely a year later.

The basis for the State's entire argument attempting to sustain Mr. Burgin's conviction under § 566.083.1(1) has been considered, and rejected, by this Court in ***Beine***, and the State has provided no reason why that issue should be relitigated. Mr. Burgin continues to be incarcerated for violating a law that this Court has declared unconstitutional. He therefore asks this Court to expedite this appeal, and to reverse his convictions and sentence and discharge him therefrom.

II.

The trial court abused its discretion in overruling Mr. Burgin's objections to the testimony from Andrea Douglas and Charles Heavel that they would be "surprised" to hear that Devin would react by hitting if told that he could not do something, because this denied Mr. Burgin his rights to due process of law and to a fair trial, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the evidence was in the nature of hypotheticals and was thus merely the witnesses' speculative opinions as to Devin's possible future behavior, which lay opinions were not admissible to show that Devin behaved in accordance with those opinions on a particular occasion. The evidence prejudiced Mr. Burgin because it improperly refuted his defense that, if Devin saw his genitals, it was unintentional and occurred only because Mr. Burgin went into the bathroom to check himself for injury after Devin hit Mr. Burgin in the groin when he was told that he would have to wait to play Nintendo.

In this case involving the credibility of John Burgin versus six-year-old Devin Heavel, the State not only presented Devin's testimony, which gave the jury a one-on-one basis on which to compare the two as witnesses, but it also was allowed to repeat Devin's testimony five additional times, by presenting hearsay evidence of Devin's accusations made to his aunt and babysitter, Andrea; his father Charles; his mother Rachel; Detective Rimiller; and then, via a videotape, to Beverly Tucker, the Child

Advocacy Center interviewer (Tr. 207-08, 221-22, 243, 271; State's Exhibit 2). On top of all that, the State was allowed to present the opinions of Devin's father, his mother, and the detective that they were each satisfied that Devin was telling the truth, and each thus permitted the inquiry to go forward (Tr. 222-23, 243-44, 276, 278-79).

After the State thus bolstered and vouched for Devin's testimony, Andrea was permitted to testify over Mr. Burgin's objection that she would be surprised to hear that Devin hit someone if he were told "no" or did not get his way (Tr. 211). Devin's father, Charles, was also asked, "Now, if you were told that Devin didn't get his way, he wanted to play with a toy or something, and he didn't get his way, so he got mad and punched somebody, would you be surprised by that?" (Tr. 223-24). Charles answered, "Very" and Mr. Burgin's objection that this was again a hypothetical was then overruled (Tr. 224). Charles again said he "would be very surprised." (Tr. 224).

Standard of Review

The trial court is afforded broad discretion in assessing the admissibility of evidence, and its ruling on the admissibility of the evidence will not be interfered with on appeal absent a clear abuse of discretion. ***State v. Mozee***, 112 S.W.3d 102, 105 (Mo.App. W.D. 2003). But that discretion is not unfettered. ***State v. Williams***, 673 S.W.2d 32, 35 (Mo. banc 1985). This Court "will take issue with the trial court in cases where we conclude there has been an abuse of discretion." ***State v. Dudley***, 912 S.W.2d 525, 529 (Mo.App. W.D. 1995), *citing* ***State v. Henderson***, 826 S.W.2d 371, 374 (Mo.App. E.D. 1992).

Admission of Hypothetical Opinion Evidence

The admission of opinion evidence is also within the sound discretion of the trial court. ***State v. White***, 790 S.W.2d 467, 473 (Mo.App. E.D. 1990). But lay witnesses must be restricted to statements of fact. ***State v. Mitchell***, 847 S.W.2d 185, 186 (Mo.App. E.D. 1993). Only a witness who knows certain facts may testify to those facts. ***State v. Luna***, 800 S.W.2d 16, 20 (Mo.App. W.D. 1990). Generally, a lay witness is allowed to testify about facts within his or her personal knowledge, but may not express opinions. ***State v. Sanders***, 842 S.W.2d 916, 919 (Mo.App. E.D. 1992).

Here, the State was allowed to have two witnesses speculate as to whether Devin would hit someone if he were told he could not something he wanted to do -- they were allowed to express their opinions as to the hypothetical situation proposed to them. Both witnesses opined that they would be surprised by such behavior, and their opinions undoubtedly went a long way to convincing the jury that Devin did not hit Mr. Burgin as Mr. Burgin testified, which thus cast doubt on Mr. Burgin's entire defense.

The improper opinion evidence went to the crucial issue in the case -- the relative credibility of Devin vs. Mr. Burgin. Without this improper evidence further bolstering Devin's story, the jury would have had a more difficult time than it already did in finding Mr. Burgin guilty. After all, it took some three and a half hours in deliberations (Tr. 378-80), which indicates that the decision as to whom to believe was not an easy one. Therefore, the unfair advantage the trial court gave the State was an abuse of its discretion, and this Court must grant Mr. Burgin a new trial.

CONCLUSION

For the reasons set forth in Point I, appellant John Burgin respectfully requests that this Court reverse his convictions and sentence and discharge him therefrom. In the alternative, for the reasons set forth in Point II, Mr. Burgin respectfully requests that the Court reverse his convictions and sentence and remand for a new trial.

Respectfully submitted,

_____
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ATTORNEY FOR APPELLANT

CERTIFICATE OF COMPLIANCE AND SERVICE

I, Kent Denzel, hereby certify as follows:

The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word 2002, in 13 point Times New Roman font, and includes the information required by Rule 55.03. According to the word-count function of Microsoft Word, excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 6,316 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disks filed with this brief and served on opposing counsel contain a complete copy of this brief, and have been scanned for viruses using McAfee VirusScan, updated in July, 2006. According to that program, these disks are virus-free.

On the _____ day of July, 2006, two true and correct copies of the foregoing brief and a floppy disk containing a copy thereof were mailed, postage prepaid, to the Office of the Attorney General, Criminal Appeals Division, 221 W. High Street, Jefferson City, MO 65102.

_____
Kent Denzel

APPENDIX

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Missouri Revised Statutes

Section *566.083*, RSMo 2000

Sexual misconduct involving a child, penalty. -- 1. A person commits the crime of sexual misconduct involving a child if the person:

(1) Knowingly exposes the person's genitals to a child less than fourteen years of age in a manner that would cause a reasonable adult to believe that the conduct is likely to cause affront or alarm to the child less than fourteen years of age;

(2) Knowingly exposes the person's genitals to a child less than fourteen years of age for the purpose of arousing or gratifying the sexual desire of any person, including the child; or

(3) Coerces a child less than fourteen years of age to expose the child's genitals for the purpose of arousing or gratifying the sexual desire of any person, including the child.

2. As used in this section, the term "**sexual act**" means any of the following, whether performed or engaged in either with any other person or alone: sexual or anal intercourse, masturbation, bestiality, sadism, masochism, fetishism, fellatio, cunnilingus, any other sexual activity or nudity, if such nudity is to be depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction.

3. Violation of this section is a class D felony; except that the second or any subsequent violation of this section is a class C felony.

(L. 1997 S.B. 56)

[Effective 8-28-03]

Missouri Revised Statutes

Section *566.083*, RSMo Cum. Supp. 2005

Sexual misconduct involving a child, penalty. -- 1. A person commits the crime of sexual misconduct involving a child if the person:

(1) Knowingly exposes his or her genitals to a child less than fourteen years of age under circumstances in which he or she knows that his or her conduct is likely to cause affront or alarm to the child;

(2) Knowingly exposes his or her genitals to a child less than fourteen years of age for the purpose of arousing or gratifying the sexual desire of any person, including the child; or

(3) Knowingly coerces or induces a child less than fourteen years of age to expose the child's genitals for the purpose of arousing or gratifying the sexual desire of any person, including the child.

2. As used in this section, the term "**sexual act**" means any of the following, whether performed or engaged in either with any other person or alone: sexual or anal intercourse, masturbation, bestiality, sadism, masochism, fetishism, fellatio, cunnilingus, any other sexual activity or nudity, if such nudity is to be depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction.

3. Violation of this section is a class D felony unless the actor has previously pleaded guilty to or been convicted of an offense pursuant to this chapter or the actor has previously pleaded guilty to or has been convicted of an offense against the laws of another state or jurisdiction which would constitute an offense under this chapter, in which case it is a class C felony.

(L. 1997 S.B. 56, A.L. 2004 H.B. 1055, A.L. 2005 H.B. 353 merged with H.B. 972)

Effective 7-13-05